Supreme Court, U.S.
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No. 00-

IN THE
SUPREME COURT OF THE UNITED STATES

MARGARET BALLS,

Petitioner,

v.

AT&T CORP.,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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January 2001

QUESTION PRESENTED

Whether the language of the Americans with Disabilities Act reaching impairments which "substantially limit" a major life activity, 42 U.S.C. § 12102(2), as construed in Sutton v. United Air Lines, 527 U.S. 471 (1999), was wholly misapplied when the lower courts held instead that "only extremely limiting disabilities ... qualify for protected status under the ADA" and that bilateral carpal tunnel syndrome did not meet this standard.

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties: petitioner Balls (the plaintiff in the district court, and appellant below), and the respondent corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MARGARET BALLS respectfully petitions this Court for a writ of certiorari to review the judgment and memorandum of the United States Court of Appeals for the Third Circuit affirming the grant of summary judgment against applicant Balls' Complaint under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq., filed and entered on July 10, 2000. Appendix A.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit affirmed the grant of summary judgment against applicant Balls' Complaint under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq., in an Unpublished Memorandum Opinion (per Weis, J., with Greenberg, J. and Schwartz, D.J., sitting by designation) filed July 10, 2000. It is noted as Balls v. AT&T, 229 F.3d 1137 (table). A copy is attached as Appendix A. The district court's Memorandum and Order dated and filed December 4, 1998, granting respondent's motion for Summary Judgment is Appendix B. It is published at 28 F.Supp.2d 970.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, affirming the grant of summary judgment against Petitioner Balls' Complaint under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq., entered in the United States District Court for the Eastern District of Pennsylvania, was filed July 10, 2000. Appx. A. On August 28, 2000, the court of appeals denied the appellant's timely petition for rehearing and for rehearing in banc. Appx. C. Ninety days from that date was November 27, 2000. On November 20, 2000, under No. 00A455, Justice Souter extended the time for filing this Petition to January 25, 2001. Rules 13.1, 13.3, 13.5. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTES and REGULATION INVOLVED

Due to their length, the pertinent provisions of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq., and implementing regulations, 29 C.F.R., part 1630, are reprinted as Appendix D.

STATEMENT OF THE CASE

This petition presents important questions concerning the application of federal disability law on which there is a split in the Circuits. The narrow view of the court below holding that "only extremely limiting disabilities ... qualify for protected status under the ADA," App. A6 (emphasis added), affirmed a grant of summary judgment against petitioner Balls, who suffers from carpal tunnel syndrome (CTS) and related ailments.

CTS is a disease process classified by OSHA as a Muscular Skeletal Disorder (MSD); it typically follows chronic repetitive stress injury on the job. The erroneous interpretation of an important federal civil rights statute by the court below puts individuals like petitioner in a "Catch 22" position not intended by Congress. Even if a person can do only "extremely limited" work because of her chronic condition, the court below would hold she is not "disabled." However, she can be terminated, because the courts hold she is not "qualified" to do her job on the basis that she requires accommodations to do it well.

Petitioner developed carpal tunnel syndrome from her work with respondent, which involved extensive keyboarding. CTS is defined as a disease by the Bureau of Labor Statistics Annual Survey, 65 Fed.Reg. 68262, 68273 (pub. Nov. 14, 2000, eff. Jan. 16, 2001) (Ergonomics Program; Final Rule), and by OSHA. 29 C.F.R., part 1910.[1] She returned to work more than once from

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[1] **Carpal Tunnel Syndrome (CTS).**

CTS is a disorder that results from compression of the median nerve at the point of passage through the carpal tunnel, the narrow opening in the hand consisting of carpal bones of the wrist on the bottom and the carpal ligament on top. The carpal tunnel is a relatively "tight" compartment filled with flexor tendons as well as the median nerve that serve to move and enervate the fingers. Forceful contraction of the flexor tendons in the fingers that occur during repetitive hand tasks increase the pressure within the carpal tunnel (Ex. 38-444). Chronic intracarpal pressure limits the vascular flow to the median nerve and surrounding tissue leading to swelling of the tendon sheath. The epineural edema leads to compression of the median nerve against the carpal

short term disability leave, with full notification to respondent by her doctors and with suggested accommodations, but AT&T refused to discuss accommodations. Petitioner requested or suggested such accommodations as voice activated software, which would have allowed her to do her job, or a transfer to another job, even if it were at a lower level. Instead, respondent AT&T terminated Ms. Balls when her disability benefits ran out in December, 1994, without engaging her in an interactive accommodation dialogue which could have allowed her to return to work.

The court of appeals erroneously affirmed the district court's grant of summary judgment, Appx. A-B, on the ground that petitioner Balls was not "disabled" with CTS, holding that the ADA protects "only extremely limiting disabilities." App. A6. In addition, the court below ignored the undeniable ground that AT&T invidiously discriminated when it regarded Ms. Balls as disabled and refused even to discuss reasonable accommodations.

The negative views of respondent AT&T and the lower courts in this case thwarted the Congressional goal,

_____(cont'd)

> ligament. The ensuing loss of nerve function initially results in painful tingling and numbness in the hand. After several years, eventually the tendon tissue can become fibrotic and result in muscle weakness, reduced grip strength and loss of finger movement. CTS is often accompanied by tenosynovitis, which is not surprising given their common pathophysiology. CTS is a disabling condition that has frequently required surgery to provide the affected individual with relief.

65 Fed.Reg. at 68260.

expressed in the ADA, "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities" and denied petitioner Balls "the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. § 12101(a)(8) & (9).

a. Procedural History

Petitioner filed a timely charge of disability discrimination with EEOC. Following investigation, EEOC issued a determination that Ms. Balls was diagnosed with the disability of Carpal Tunnel Syndrome, and that medical documentation dated March 18, 1994, April 29, 1994, June 15, 1994, August 4, 1994 and October 24, 1994, indicated that she could return to work provided she was given accommodation. According to EEOC, the record as a whole made clear that respondent did not attempt to return petitioner to work with any accommodation. There was no "record of attempt at acquiring or modifying equipment, job restructuring or reassignment to a vacant position," according to EEOC, although Ms. Balls had requested accommodation. The EEOC Area Director "determined that the evidence obtained during the investigation establishes a violation of the statute." (Attached to Complaint as Exhibit B.)

After EEOC conciliation failed, petitioner filed her complaint with the district court in February, 1998, claiming that she had been terminated in violation of the ADA in December, 1994, and that her employer had refused to engage in a dialogue to accommodate her disability. After discovery, respondent moved for summary judgment. The district court granted respondent's motion on December 4, 1998, on four alternative

grounds: (1) that petitioner was judicially estopped from claiming she was a "qualified individual," because she had applied for disability benefits claiming she was disabled; (2) that she could not prove she was "qualified" because she could no longer type 45 words a minute, which was a requirement of her position; (3) that the voice activated software accommodations she requested would have imposed "an undue hardship" on AT&T, while the other suggested accommodations showed her to be unqualified; and (4) that she did not present demographic evidence that her CTS precluded her from performing an entire class or a broad range of jobs.

After the filing of a timely notice of appeal, and after briefing, the court of appeals issued an unpublished Memorandum Opinion on July 10, 2000, affirming the grant of summary judgment against Petitioner on the single ground that she was "not disabled." Appx. A. The court of appeals did not rely on judicial estoppel, relegating it to a footnote as an issue it need not reach.[2] Rather, the court of appeals affirmed on the ground that petitioner was not disabled within the meaning of the statute, holding that "only extremely limiting disabilities ... qualify for protected status under the ADA." App. A6. The court recited that because petitioner was employed briefly doing clerical work and admitted that she could work as a receptionist or in sales, so long as there were limitations on typing, a jury could not conclude that her carpal tunnel syndrome constituted a significant barrier to employment.

[2] That ground for the summary judgment conflicted with this Court's opinion in Cleveland v. Policy Management Sys. Corp., 526 U.S. 795 (1999), issued after the district court's opinion.

On August 28, 2000, the court below denied a timely petition for rehearing and rehearing in banc. Appx. C. That petition called the court of appeals' attention to the "regarded as" definition of disability under 42 U.S.C. § 12102(2)(C) and 29 C.F.R. § 1630.2(l); it also contradicted factual errors in the decision.

b. Statement of Facts

Petitioner Margaret Balls began working for AT&T as a Communications Assistant in December, 1992. She served as an intermediary in telephone conversations where one party used a telecommunications device for the deaf, hard of hearing, or speech impaired (TDD). The job involved translating written messages into verbal form by phone/video display terminal, and translating verbal responses into written messages. One of the qualifications on the job description was the ability to type 45 words per minute without error. The description did not state that she had to be able to do this for over eight hours a day without rest on a six day schedule with mandatory overtime, or that she would have to handle an average of 200 calls a day or 900 a week (Balls Depo., Def't Summary Judgment Exh. A, at 50). Yet she did, until December, 1993, when her arms developed excruciating pain. Petitioner went out on short-term disability, came back to work part-time, suffered more pain, and endured surgery. She could not, however, get respondent AT&T to engage in an accommodation dialogue, as required by statute, so that she could continue to work and could avoid exacerbating her condition.

Although petitioner Balls repeatedly presented medical documentation that stated she could return to work with accommodation, see EEOC Determination, AT&T never engaged in the interactive dialogue to

determine the appropriate "reasonable accommodation." 29 C.F.R. § 1630.2(o)(3); App. D. Instead, respondent terminated her, maintaining (1) that she was not qualified because she could not keyboard for long periods of time, although it had never discussed or considered available accommodations; and at the same time arguing (2) that she was not an "otherwise qualified person with a disability" under the ADA.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(i). The United States District Court for the Eastern District of Pennsylvania had jurisdiction over this case under 28 U.S.C. § 1331, in that the complaint rested on a claim of disability discrimination under a federal statute, 42 U.S.C. § 12101 et seq. The jurisdiction of the court of appeals rested upon 28 U.S.C. § 1291. Appellate jurisdiction was timely invoked by Notice of Appeal.

REASONS FOR GRANTING THE WRIT

1. This Court should correct the egregious misreading of Sutton v. United Air Lines, 527 U.S. 471 (1999), as well as a critical departure from the language of the Americans with Disabilities Act, which the lower court effected when it held that "only extremely limiting disabilities ... qualify for protected status under the ADA."

The Americans with Disabilities Act (ADA) protects individuals with "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (emphasis added); see App. D. Nowhere in the statute did Congress limit the protection of the ADA to "extremely limiting disabilities," a standard recently adopted by the United States Court of Appeals for the Third Circuit. Appx. A6 (emphasis added), citing Marinelli v. City of Erie, 216 F.3d 354, 362 (3d Cir. 2000).

This Court certainly did not endorse such a standard in Sutton v. United Air Lines, 527 U.S. 471 (1999). It is true that this Court noted that mitigating measures must be considered when determining if a person is disabled, noting that Congress must not have intended to cover all common, minor vision impairments under the ADA. However, nowhere did the Court suggest that the language of the ADA meant anything close to "extremely limiting disabilities." "Extremely," defined as to the greatest degree," *Webster's New World*

Dictionary of the American Language (1968), goes well beyond the statutory language "substantially," defined as "considerable" or "to a large degree." Sutton, 527 U.S. at 491.

The lower court's baseless narrowing of the range of disabilities covered by the ADA resulted in affirmance of a summary judgment grant against a woman who was without question "disabled" under the ADA. Petitioner suffered from bilateral carpal tunnel syndrome and related ailments. CTS prevented her from returning full time to her position, which involved keyboarding telephone conversations for the hearing and speech-impaired, despite the fact that she tried numerous times to keep doing her job.

The theory adopted by the court below is based on a mistaken interpretation of 29 C.F.R. § 1630.2(j); see App. D (Statutes and Regulation Involved). That regulation of the EEOC provides, in part:

> (j) Substantially limits -- (1) The term substantially limits means:
>
> (i) Unable to perform a major life activity that the average person in the general population can perform; * * *
>
> (3) With respect to the major life activity of working --
>
> (i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

A person whose disability placed her within the language of § 1630.2(j)(3)(i) might be said, somewhat hyperbolically, to be "extremely limited" in her employment options. But even so, that is no warrant to substitute a standard of "extreme limitation" for the statute's "substantially limits." A jury could easily find, even without the aid of an expert, that a disabling medical condition that prevents a person from keyboarding for extended periods of time blocks that person, in the contemporary job market, from both "a class of jobs" and "a broad range of jobs in various classes." The lower court's legal error thus led it to a mistaken affirmance of the improper summary judgment.

It should hardly be subject to argument today that the physical ability to utilize a computer keyboard is fundamental to an entire class of jobs, and also to "a broad range of jobs in various classes" of employment opportunity, not merely to the "particular" job done by the workers once known as "typists." The repetitive motions in this activity were subject to numerous studies in which resulted in the recent OSHA rulemaking on Ergonomics, see 29 C.F.R., part 1910, which sought to prevent such disease processes:

> **Repetition.** Repetition refers to the frequency with which a task or series of motions is repeated over and over again with little variation in movement. When motions are repeated frequently (e.g., every few seconds) for prolonged periods such as several hours or an entire work shift, fatigue and strain of the muscle and tendons can occur because there may be inadequate time for recovery. Repetition often involves the use of only a few

> muscles and body parts, which can become extremely fatigued even though the rest of the body is unaffected.
>
> Repetitive motions occur frequently in manufacturing operations where production and assembly processes have been broken down into small sequential steps, each performed by different workers. Repetition is also present in many manual handling operations, such as warehouse operation and baggage handling. Repetition is typically assessed by direct observation or videotaping or as a percent of task cycle time, where a cycle is a pattern of motions.

65 Fed. Reg. 68262, 68338 (pub. Nov. 14, 2000, eff. Jan. 16, 2001) (Ergonomics Program; Final Rule, IV. Summary and Explanation) (emphasis added). See *Job Hazard Analysis Tools Chart*, 65 Fed. Reg. at 68859, listing small parts assembly, inspecting, meatpacking, sewing, packaging, keyboarding, data processing, and other "jobs involving highly repetitive hand motions"; see also Shelton v. General Electric Aerospace Division, 1998 WL 187413, *9 (N.D.N.Y., filed April 14, 1998) (keyboarding could itself constitute a "class of jobs" within the meaning of 29 C.F.R. § 1630.2(j)(3)(i)). An ADA plaintiff need not show that she is restricted from performing all jobs; the standard is not equivalent to that for receiving Social Security Disability benefits, for example.

To correct the lower courts' blatant misstatement, restriction and misapplication of a statutory standard that this Court attempted to clarify in Sutton v. United Air Lines, a writ of certiorari should be granted in this case.

2. The Third Circuit's standard for finding disability conflicts with that of other circuits.

When the Third Circuit held that only "extremely limiting disabilities" are protected by the ADA, it created a conflict among the circuits, especially in cases of Carpal Tunnel Syndrome. At least five other circuits employ a test for disability which is faithful to the statutory language, eschewing the Third Circuit's relief-defeating gloss, thus allowing protection to workers disabled by CTS. Certiorari should be granted for the additional reason of resolving this conflict in the circuits.

Proof of bilateral CTS with evidence that nerve irritation was both recurrent and permanent established a disability under the ADA, because of the substantial limitation on working, according to the First Circuit in Quint v. A.E. Staley Manufacturing Co., 172 F.3d 1, 8 (1st Cir. 1999). In Williams v. Toyota Manufacturing, Kentucky, Inc., 224 F.3d 840, 843 (6th Cir. 2000), recurrent CTS established "disability" from performing manual tasks, also under the ADA. In a class action successfully overturning summary judgment on a challenge to a policy to terminate permanently injured employees instead of engaging in an interactive process, both parties and the court accepted without argument that production workers with CTS were disabled or perceived as disabled. Hendricks-Robinson v. Excel Corp., 154 F.3d 685 (7th Cir. 1998).

Likewise, in Cravens v. Blue Cross and Blue Shield of Kansas City, 214 F.3d 1011 (8th Cir. 2000), a senior operations specialist whose job required much "keying" or typing information into a computer was permanently

restricted because of bilateral CTS to no or minimal keyboard activity. The Eighth Circuit held the evidence on summary judgment was sufficient to establish that Cravens was a qualified individual with a disability under the ADA, and that the evidence raised a question whether the company failed to accommodate her by refusing to assign her to a different job. The Ninth Circuit has reversed a grant of summary judgment entered against an office specialist with CTS who requested accommodations when she tried to return to work. Johnson v. State of Oregon, 141 F.3d 1361 (9th Cir. 1998). That Court's reversed the lower court's application of the judicial estoppel doctrine, without suggesting any concern that the limitations caused by her CTS were sufficient to show that she was a qualified individual with a disability.

None of the circuits which rendered these five published decisions in the last three years adopted the "extremely limiting" standard of the court below. The evidence of impairment similar to petitioner Balls' did not in those other circuits preclude similarly situated claimants from attempting to prove their cases at trial under the ADA.

This Court should resolve the split in the circuits, and instruct the court below to apply the statutory standard of "significantly" impaired, as construed by this Court in Sutton.

3. The Third Circuit's refusal even to consider whether the evidence presented established that AT&T regarded petitioner as disabled must also be corrected, either in this Court or by remand.

When AT&T refused to engage in an interactive dialogue on suggested accommodations, and then terminated Petitioner without considering whether there were vacant positions within such a large corporation to which she could have been transferred, AT&T demonstrated that it regarded petitioner as disabled. This Court should also correct the failure of the court below even to acknowledge this additional claim in petitioner's ADA case.

A recent case from another circuit, Ross v. Campbell's Soup Co., 2001 FED App. 0009P (6th Cir., filed Jan. 10, 2001), cogently analyzes the "regarded as" prong of the definitions of "disability," 42 U.S.C. § 12102(2)(C), in a situation analogous to that of petitioner. In both cases the employers were well aware of the medical conditions of their employees. However, both apparently determined without discussions of accommodations that the employer had no jobs it would make available to the affected employee. The Sixth Circuit correctly recognized that the drafters of the ADA and it regulations "intended that plaintiffs who are mistakenly regarded as being unable to work have a cause of action under the statute." Id. at 6. Although petitioner raised this issue in her case as well, the Third Circuit did not even mention it while mistakenly affirming the grant of summary judgment. The court below should be directed to consider it in addition on remand, or upon granting the writ for the reasons given under Points 1 and 2 of this

Petition, this Court may wish simply to reverse the grant of summary judgment on this further ground as well.

CONCLUSION

The court below misapplied the precedents of this Court. The Third Circuit's erroneously narrow view of what disabilities are protected by the ADA also presents a conflict with at least four other circuits in their application of the ADA to carpal tunnel syndrome. For the foregoing reasons, this Court should grant the petition of Margaret Balls for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

ANNA M. DURBIN
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January 25, 2001.

APPENDIX A

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1089

MARGARET BALLS,
Appellant

v.

AT&T CORP.

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civ. No. 98-cv-01016)
District Judge: Honorable Marvin Katz

Argued June 20, 2000
Before: GREENBERG and WEIS, Circuit Judges,
and SCHWARTZ,* District Judge

Filed JUL 10 2000

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* The Honorable Murray M. Schwartz, United States District Judge for the District of Delaware, sitting by designation.

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MEMORANDUM OPINION OF THE COURT

WEIS, Circuit Judge.

We review a grant of summary judgment in this suit under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq., where an employee alleged she was wrongfully discharged. The District Court concluded that summary judgment was appropriate because under the Act, plaintiff was neither disabled nor a "qualified individual." Because we agree that plaintiff was not

disabled, we will affirm the judgment of the District Court.[1]

AT&T hired Margaret Balls to work at its Wayne, Pennsylvania facility in December of 1992. She worked as a Communications Assistant, serving as an intermediary in telephone conversations where a telecommunications device for the deaf was used by one party. The job description for a Communications Assistant requires a person to type at least 45 words per minute without error.

Plaintiff worked approximately eight hours a day, five or six days a week, handling over 900 phone calls. Because of the onset of pain, plaintiff underwent surgery on her left hand in June of 1993 to remove a nodule from a tendon. She was on disability leave for four weeks while she recovered, then returned to work at AT&T.

In the fall of 1993, plaintiff again complained of hand pain. In December of that year, plaintiff informed her work supervisor that the pain was such that she was unable to perform her job. The first physician she visited diagnosed carpal tunnel syndrome and stenosing tenosynovitis as possible causes of the pain. He instructed her to do no typing for more than forty-five minutes per hour.

Physicians who examined her later suggested her difficulty might also be related to Dupuytren's disease, a condition which reduces hand dexterity. Plaintiff

[1] The District Court also ruled that judicial estoppel barred the plaintiff's claim. The Court concluded that plaintiff could not rely on factual assertions in this ADA suit which were inconsistent with prior assertions made in her application for social security disability benefits, a prior tax return, and in prior litigation. Because of our disposition on the issue of the plaintiff's disability, we find it unnecessary to address the question of estoppel.

requested and received a leave of absence and short-term disability benefits beginning December 22, 1993. Fifty-two weeks later, the benefits expired, plaintiff did not return to work, and AT&T terminated her employment.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291. Review of a District Court's ruling on a Rule 56(c) motion for summary judgment is de novo. Krouse v. American Sterilizer Co., 126 F.3d 494, 500 n.2 (3d Cir. 1997). We affirm the judgment only where we independently determine there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-49 (1986).

Quoting the Equal Opportunity Employment regulations at 29 C.F.R. § 1630.2(j)(3)(i), which state that the "inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working," the District Court found no evidence that plaintiff was unable to perform a broad range of jobs, nor had she so argued. Therefore, her inability to operate a computer keyboard for sustained periods of time did not substantially limit the life activity of working, and was not a disability under the Act. On appeal, plaintiff disputes this conclusion, asserting that the typing limitation satisfies the "class of jobs" language in the regulations.

Plaintiff "bears the burden of establishing that [s]he is disabled within the meaning of the ADA, [s]he must affirmatively introduce evidence to this end in order to survive a motion for judgment as a matter of law." Marinelli v. City of Erie, [216] F.3d [354,] No.99-3027,

slip op. at 15 (3d Cir. June 22, 2000). In Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778 (3d Cir. 1998), this court described a two-stage analysis for determining whether an individual is substantially limited in one or more life activities. The first step is to determine "whether the individual is substantially limited in any major life activity other than working, such as walking, seeing, or hearing." Id. at 783. If any such activity is substantially limited, the analysis should end there.[2] Id. at 784.

If not, the Court proceeds to the second step and will consider whether an individual is substantially limited in the ability to work. Id. "[T]he court must consider the effect of the impairment on the employment prospects of that individual with all of his or her relevant personal characteristics," and whether it constitutes a significant barrier to employment. Id. With this approach, "an individual's training, skills, and abilities are taken into account in determining whether the individual is substantially limited in the major life activity of working ...." Id. Furthermore, we have noted that an individual who "'is unable to perform a particular job for one employer, or ... is unable to perform a specialized job' is not substantially limited in his ability to work." Marinelli, slip op. at 16 (quoting 29 C.F.R. App. § 1630.2(j)) (omission in original).

[2] Requiring this preliminary step, so as to avoid an unnecessary consideration of "working" as a life activity, was both practical and prescient. Since this Court's decision in Mondzelewski the Supreme Court has cast doubt on the logic of considering work to be a life activity in the context of the ADA. Sutton v. United Air Lines, Inc., 527 U.S. 471, 492 (1999).

The Supreme Court addressed this issue in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), where it said that "[t]o be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs." Id. at 492. The Court concluded that because the plaintiffs in that case, myopic airline pilots, may still work as regional pilots or flight instructors, their inability to be global airline pilots was not a "substantially limiting impairment." Id. at 493. Our past cases demonstrate that "only extremely limiting disabilities ... qualify for protected status under the ADA." Marinelli, slip op. at 12-13.

In the present case, plaintiff has alleged that her impairment, carpal tunnel syndrome, has rendered her unable to type for sustained periods. The record includes no evidence permitting the inference that a broad range of jobs was beyond her capability. In fact, while she received disability payments, plaintiff was employed briefly doing clerical work. In her deposition, plaintiff admitted she could work as a receptionist or in sales, so long as there were limitations on typing.

On these facts, a reasonable jury could not conclude that the carpal tunnel syndrome constituted a significant barrier to employment. We therefore conclude that plaintiff failed to present evidence sufficient to create a question of material fact as to whether she was disabled under the ADA.

Accordingly, we have no need to address the other issues and will affirm the judgment of the District Court.

TO THE CLERK:

Please file the foregoing Opinion.

/s/ Weis
United States Circuit Judge

APPENDIX B

Reported in 28 F.Supp.2d 970
14 NDLR ¶ 144

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Margaret BALLS,
Plaintiff,

v. **Civil Action No. 98-1016**

AT&T CORP.,
Defendant.

*971 Joseph A. Ferry, Carosella & Ferry, P.C., West Chester, PA, for Plaintiff.
Daniel V. Johns, Ballard, Spahr, Andrews & Ingersoll, Philadelphia, PA, for Defendant.

MEMORANDUM AND ORDER

KATZ, District Judge **Dec. 4, 1998**

Plaintiff Margaret Balls has sued her former employer, AT&T, alleging that AT&T discriminated against her in violation of the Americans with Disabilities Act (the ADA) by removing her from its payroll after she collected short-term disability benefits for a year for her carpal tunnel syndrome. Before the court are AT&T's motion for summary judgment and Ms. Balls's response. For the reasons discussed below, the court will grant the motion and dismiss the case.

Relevant Facts

AT&T hired Margaret Balls on December 7, 1992 as a Communications Assistant (CA) in AT&T's Communications Services Organization in Wayne, Pennsylvania. The job of a CA is to provide relay services to deaf, hard-of-hearing, and speech impaired telephone customers. *See* Def. Ex. B (AT&T Communications Assistant Job Description). Basically, the CA's job is to facilitate phone calls between customers using a telephonic ***972** device for the deaf (TDD) and customers on regular phones: the TDD user types in his or her part of the conversation, the CA sees it on a screen and reads it out loud to the person on the regular phone. The phone user speaks back, the CA types in each word, and the TDD user sees that part of the conversation on a screen at his or her device.

One primary job requirement is that a CA must be able to type forty-five words per minute. *See* Def. Ex. B. Ms. Balls testified in her deposition that in order to keep up with the verbatim phone conversations, it was necessary to type sixty to seventy words per minute, and while she was working the job she typed between seventy and eighty words per minute. *See* Def. Ex. A (Balls Depo.) at 55. Ms. Balls recollected that she handled roughly 900 calls a week, which calls could of course vary widely in length, and at least seventy percent of her time on each call was spent typing. *See* Def. Ex. A at 46, 55.

In December 1993, Ms. Balls informed her supervisor that she had pain in her hands and arms which prevented her from doing her job. *See* Def. Ex. A at 87. She filled out the paperwork to apply for short-term

disability. *Id.*[1] She was approved as disabled on December 15, 1993, and she received disability payments for the full fifty-two weeks allowed under the program.

In November, one month before her short-term benefits were to run out, Ms. Balls applied for long-term disability under AT&T's plan. Disability for those purposes means that "the employee is prevented by reason of such sickness or injury from engaging in any occupation or employment for which the employee is qualified, or may reasonably become qualified, based on training, education, or experience." Def. Ex. M (letter from AT&T to Ms. Balls). Her application for long-term benefits was denied.

Plaintiff also applied for Social Security disability benefits. In so doing, Ms. Balls had to certify that she was totally disabled and completely unable to work. Plaintiff's claim was ultimately denied, after consideration through the full administrative review and appeals process.

After AT&T denied plaintiff's claim for long-term disability, she sued the company in state court. In her complaint, she alleged that she was "entitled to a full 18 months of long-term benefit pay." Def. Ex. O. She further stated that the disability pay "has no bearing on any other compensations I will be entitled to, such as ... EEOC." *Id.* The case was removed to federal court, and plaintiff filed a Definitive Statement of Allegations that

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[1] Under the AT&T disability plan, an employee is considered disabled if the relevant committee "determines that you are unable to perform the duties of your job and you cannot be accommodated at another job within the Company." Def. Ex. D (AT&T "About Your Benefits" Handbook) at 226.

said, among other things, that she was unable to work and entitled to disability pay. Def. Ex. P.

In March 1998, Ms. Balls filed an amended federal tax return for 1995, indicating that she was permanently and totally disabled. *See* Def. Ex. Q. That status requires that the person "cannot engage in any substantial gainful activity because of a physical or mental condition." *Id.* at 4.

When her short-term disability payments ran out in December 1994, AT&T did not return plaintiff to work. In February 1998, Ms. Balls filed the present lawsuit, claiming that she was able to work in 1994 and that AT&T discriminated against her because of her carpal tunnel syndrome in violation of the ADA.

Discussion[2]

To make out a prima facie case of discrimination under the ADA, the plaintiff must *973 prove that

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[2] Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). At the summary judgment stage, the court does not weigh the evidence and determine the truth of the matter. Rather, it determines whether or not there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In making this determination, all of the facts must be viewed in the light most favorable to, and all reasonable inferences must be drawn in favor of, the non-moving party. *See id.* at 256, 106 S.Ct. 2505.

The moving party has the burden of showing there are no genuine issues of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986);

(1) she has a disability; (2) she is a qualified individual, i.e., she can perform the essential functions of the job with or without reasonable accommodations by the employer; and (3) she has suffered an adverse employment action because of her disability. *See Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 142 (3d Cir. 1998); see also 42 U.S.C. §§ 12111(8), 12112(a). Plaintiff here cannot make out a case for three reasons: first, she cannot prove that she is a qualified individual because she is judicially estopped from so claiming; second, she cannot prove that she is a qualified individual because she cannot prove she could perform the essential functions of the job; and third, she cannot prove that she is disabled, because she has not presented the evidence necessary to show that her condition substantially limits a major life activity.

Judicial Estoppel

[1] Judicial estoppel bars this claim because plaintiff claimed total disability in prior proceedings, inconsistently with her position in this case. *See McNemar v. Disney Store, Inc.*, 91 F.3d 610 (3d Cir. 1996), *cert. denied*, 519 U.S. 1115, 117 S.Ct. 958, 136 L.Ed.2d 845 (1997). Although it has been criticized, *McNemar* remains the law in this Circuit. *See Krouse v. American Sterilizer Co.*, 126 F.3d 494, 502-03 (3d Cir. 1997). The

(continued)

Mathews v. Lancaster General Hosp., 87 F.3d 624, 639 (3d Cir. 1996). In response, the non-moving party must adduce more than a mere scintilla of evidence in its favor, and cannot simply reassert factually unsupported allegations contained in its pleadings. *See Anderson*, 477 U.S. at 249, 106 S.Ct. 2505; *Celotex*, 477 U.S. at 325, 106 S.Ct. 2548; *Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir. 1989).

Krouse court emphasized, though, that *McNemar* requires the court to examine the individual facts of the case by carefully adhering to the two-prong test set forth in *Ryan Operations v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 361 (3d Cir. 1996): (1) is the current position inconsistent with the prior positions, and (2) does the plaintiff assert either or both of the positions in bad faith, i.e., with the intent to play fast and loose with the court.

The court finds that Ms. Balls's statements of her inability to work in her application for long-term disability benefits, her application for social security disability benefits, her small claims complaint and statement in federal court in that case, and her tax return are inconsistent with her current position that she was able to work. Based on the number and plainness of these statements, the court further finds that Ms. Balls has made the inconsistent statements in bad faith.

Qualified Individual.

[2] Even if judicial estoppel does not bar plaintiff's claim, she is unable to prove that she is a qualified individual, because it is undisputed that she is unable to type forty-five words per minute to relay messages of hearing-impaired customers for eight hours a day which is an essential part of the job. A job function is essential if, inter alia, "the reason the position exists is to perform that function." 29 C.F.R. § 1630.2(n)(2)(i). AT&T's Job Description for the position of Communications Assistant states, "The primary focus of this function is to service the customer effectively by relaying conversations accurately, transparently and confidentially." *See* Ex. B. The description further states, "The qualifications of a Communications Assistant include the ability to: Type a

minimum of 45 wpm without error." *Id.* At her deposition, Ms. Balls confirmed that typing 45 words per minute is a qualification for the job, and stated that she could not do so. *See* Ex. A at 43 (confirming that the statement of the function and qualifications contained in the job description is accurate), 141-42 ("I was not able to do computer keyboarding for a full eight-hour day plus other overtime that was demanded.").

[3] Apart from one general question about alternative work, *see* Pl.Ex. A (letter from plaintiff's then-counsel to AT&T, asking "Is there some type of work which she can perform which is within her limitations?"), the only request for accommodation that the record demonstrates was communicated *974 to AT&T is a suggestion that, instead of typing, Ms. Balls could use some sort of voice-activated technology. During her short-term disability leave, her doctor mentioned this possibility in the last two updates of her condition.[3] Assuming these two comments constituted a request for accommodation, it is unreasonable as a matter of law, because "[a]ccommodations that are 'reasonable' must not unduly strain financial resources." *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1386 (3d Cir. 1991). The Declaration of William Sheeley, the Network Service Manager for AT&T, explains that "[t]here was no voice-activated technology applicable to

[3] First, in a Physician's Report Of Illness or Injury dated June 20, 1994, Dr. Huxster said "could return to work on trial bases [sic], attempting to limit use of [right] hand for keyboarding. (Voice activated equipment?)" Def. Ex. J. Second, in an On-Duty Injury/Illness Report dated August 16, 1994, he said "Non-keyboarding activities (Voice activated equipment?) avoid strenuous/repetitive use of hands." Def. Ex. K.

the Wayne Relay Center that was available in 1994," and that even the voice-activated technology that has been developed since "would cost AT&T more than $12 million and likely would take more than 2 years to complete." Def. Ex. V.[4] An employer is not required to provide an accommodation that would impose an undue hardship on the operation of the employer's business. See 29 C.F.R. Pt. 1630, App. § 1630.2(p). "The term 'undue hardship' means significant difficulty or expense in, or resulting from, the provision of the accommodation." *Id.* Spending twelve million dollars on a two-year process involving the steps Mr. Sheeley describes is an undue hardship, and the ADA does not require AT&T to do it.[5]

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[4] Mr. Sheeley further explains that his estimate of the expense is based on the cost of

> "replacing over 650 computers, expanding the memory control units (SCU's) to 20 times their current size, building new centers to handle the same call volume, expanding the equipment rooms to handle the larger equipment needs, and providing at least 6 hours of training the system software to recognize each individual employee's voice patterns for more than 600 employees. It is impossible for AT&T to install a voice activated system for only one employee as each computer is inter-tied and it is impossible to break this network for a single computer."

Def. Ex. V.

[5] Providing voice-activated technology is unreasonable for an additional reason: "'reasonable accommodation' does not mean elimination of any of the job's essential functions." *Gilbert v. Frank*, 949 F.2d 637, 642 (2d Cir. 1991). Using a voice-activated system instead of typing would change the fundamental nature of the job, which is essentially a typing job.

[4] Another accommodation discussed in the motion is that Ms. Balls type for no more than two hours a day. At her deposition, Ms. Balls said that Dr. Huxster suggested this possibility, although she said she was not sure if it meant she could not type more than two hours in a row or two hours total in a day. *See* Def. Ex. A at 108-10. Ms. Balls also testified that the two-hour restriction suggestion was communicated to AT&T by Dr. Huxster by fax, *see* id. at 110, but there is no evidence in the record that such a suggestion actually was ever made to AT&T by plaintiff or any doctor. Because 75% of the job time is spent typing, this proposed "accommodation" amounts to a proposal that Ms. Balls not work full-time. As Ms. Balls herself explained at her deposition, even a single phone call could be "even a three-hour conversation," *see* Def. Ex. A at 46, so a two-hour limit is incompatible with the requirements of the job. *See Washington v. Andersen Consulting, LLP*, No. 97-C-2765, 1997 WL 106262, at *4 (N.D.Ill. Feb. 13, 1997) (where plaintiff's carpal tunnel syndrome made her unable to type more than three hours a day and where typing was an essential function of her job, she was not qualified to do the job and her employer did not violate the ADA by firing her).

Disability

[5] Plaintiff's claim must be dismissed for the further reason that she fails to meet another prong of the prima facie case, namely the requirement that she have a disability. An individual is disabled under the ADA if she has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). Major life activi-

ties are "functions such as caring for oneself, performing manual tasks, walking, seeing, *975 hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). Plaintiff claims that her carpal tunnel syndrome substantially limited her major life activity of working, because it made her unable to type for eight hours a day.[6]

Under the ADA, an individual is considered substantially limited in the major life activity of working if the individual is "significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i); *see also Olson v. General Elec. Astrospace*, 101 F.3d 947, 952 (3d Cir. 1996) (applying that section).

To determine whether an individual is significantly restricted from performing a broad range of jobs, the regulations say that the following factors may be considered:

> (A) The geographical area to which the individual has reasonable access;

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[6] Defendant's motion states that plaintiff may also claim that she is limited in the major life activity of performing manual tasks. If she did so argue, the court would consider the manual task limitation claim first, because "[i]f an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working." 29 C.F.R. Pt. 1630, App. § 1630.2(j). In her response to this motion, however, plaintiff does not pursue the manual task limitation argument, so the court will make a determination as to whether she is limited in working.

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical are, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3)(ii). The regulations further explain that although these factors "are not intended to require an onerous evidentiary showing," they do "require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., 'few,' 'many,' 'most') from which an individual would be excluded because of an impairment." 29 C.F.R. Pt. 1630 App. § 1630.2(j).

[6] Based on those requirements, "a plaintiff must present demographic evidence to show from what jobs in her geographic area plaintiff has been excluded due to her disability. A plaintiff's failure to do so is fatal at summary judgment." *Taylor v. Phoenixville School Dist.*, 998 F.Supp. 561, 568 (E.D.Pa. 1998) (internal quotes and cites omitted); *see also Ellis v. Mohenis Services Inc.*, No. Civ. A. 96-6307, 1998 WL 564478 at *4 (E.D.Pa. Aug.24, 1998) (where plaintiff did not offer the required demographic evidence of jobs he was disqualified, "the

record cannot support a finding that [plaintiff] was precluded from employment in an entire class or a broad range of jobs").

Plaintiff has presented no such evidence. Plaintiff does not even argue that she was unable to perform a broad range of jobs; in fact, she argues that there were many jobs even within AT&T that she could have performed (an argument which is also without record support). Without evidence that her condition precluded her from performing a broad range of jobs, plaintiff cannot make out the disability element of her prima facie case.

Conclusion

For these reasons, AT&T's summary judgment motion will be granted and the case will be dismissed. An appropriate Order follows.

ORDER

AND NOW, this 4th day of December, upon consideration of the Motion for Summary Judgment of Defendant AT&T and *976 the response thereto, it is hereby ORDERED that said Motion is GRANTED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1089

MARGARET BALLS,
Appellant

v.

AT&T CORP.

Present: MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, BARRY, AMBRO, FUENTES, WEIS, and GREENBERG, Circuit Judges and SCHWARTZ, District Judge.

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/Carol Los Mansmann
Circuit Judge

AUG 28 2000

***Judge Weis', Judge Greenberg's and Judge Schwartz's votes were limited to panel rehearing.**

APPENDIX D

The Americans With Disabilities Act, Pub. L. 101-336, July 26, 1990, 104 Stat. 327, 42 U.S.C. §§ 12101 et seq., provides, in pertinent part:

CHAPTER 126 -- EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

§ 12101. Findings and purpose

(a) **Findings.** The Congress finds that--

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies

people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) **Purpose**

It is the purpose of this chapter--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

(Pub. L. 101-336, Sec. 2, July 26, 1990, 104 Stat. 328.)

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services. The term "auxiliary aids and services" includes--

(A) qualified interpreters or other effective methods of making aurally delivered

materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability. The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State. The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(Pub. L. 101-336, Sec. 3, July 26, 1990, 104 Stat. 329.)

SUBCHAPTER I--EMPLOYMENT

§ 12111. Definitions

As used in this subchapter:

(1) Commission. The term "Commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (§ 2000e-4 of this title).

(2) Covered entity. The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee. The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer.

(A) In general. The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions. The term "employer" does not include--

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

(6) Illegal use of drugs

(A) In general. The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs. The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

(7) Person, etc. The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written

description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation. The term "reasonable accommodation" may include --

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include --

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such

facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

(Pub. L. 101-336, title I, Sec. 101, July 26, 1990, 104 Stat. 330; Pub. L. 102-166, title I, Sec. 109(a), Nov. 21, 1991, 105 Stat. 1077.)

§ 12112. Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a) of this section, the term "discriminate" includes --

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such

applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general. It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a work-

place in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation.

(A) Presumption. If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception. This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination. For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on --

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general. The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination. A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if --

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that --

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement. Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

(Pub. L. 101-336, title I, Sec. 102, July 26, 1990, 104 Stat. 331; Pub. L. 102-166, title I, Sec. 109(b)(2), Nov. 21, 1991, 105 Stat. 1077.)

Title 29 of the Code of Federal Regulations ("Labor"), revised as of July 1, 2000, provides, in pertinent part:

PART 1630 -- REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

§ 1630.2 Definitions.

(a) Commission means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(b) Covered Entity means an employer, employment agency, labor organization, or joint labor management committee.

(c) Person, labor organization, employment agency, commerce and industry affecting commerce shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(d) State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(e) Employer -- (1) In general. The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each

of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) Exceptions. The term employer does not include --

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(f) Employee means an individual employed by an employer.

(g) Disability means, with respect to an individual--

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; or

(3) Being regarded as having such an impairment.

(See Sec. 1630.3 for exceptions to this definition).

(h) Physical or mental impairment means:

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(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain

syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits -- (1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working --

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person

having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(k) Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but

is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

(m) Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.
(See Sec. 1630.3 for exceptions to this definition).

(n) Essential functions -- (1) In general. The term essential functions means the
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fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among

whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(o) Reasonable accommodation. (1) The term reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(p) Undue hardship -- (1) In general. Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

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(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(q) Qualification standards means the personal and professional attributes including the skill, experience,

education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

(r) Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.